

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**  
**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**



**EU Portability Regulation**  
**In-depth Analysis**  
**of the Proposal**

IN-DEPTH ANALYSIS FOR THE JURI COMMITTEE



**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

**EU Portability Regulation:**  
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**IN-DEPTH ANALYSIS**

**Abstract**

Upon request by the JURI Committee, this In-depth-Analysis identifies and analyses the recent proposal of the European Commission concerning a regulation on ensuring the cross-border portability of online content, COM(2015)627.

## **ABOUT THE PUBLICATION**

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## GENERAL INFORMATION

### KEY FINDINGS

- In general, the Proposal is in line with the *acquis communautaire* in the field of copyright law. The proposed regulation is the expression of a restrictive approach on cross-border access copyright-protected content, since it does not abrogate or negate the principle of copyright territoriality. Specifically, it appears to be a specific breach of that principle, and thus an exceptional case where the principle shall not apply.
- The privilege of portability has a hybrid nature. This has specific practical consequences. As a copyright exception, it has to be interpreted narrowly under the scope of the three-step test. As a lawful user's right, it has to be truly effective and fully guaranteed against opposing contractual clauses.
- The concept of temporary presence in another Member State should be detailed, since portability, as a copyright exception, must pass the three-step test. The exception cannot apply to situations where the criterion of "temporary presence" is abused. It must be clear that the Regulation does not tolerate or indirectly permit such abusive practices.
- The mechanisms of enforcement of the subscriber's right to portability shall be further defined. As it stands, a violation by the online service provider of the portability obligation could be deemed to constitute a breach of contract. Nonetheless, it has to be explored whether additional mechanisms could strengthen the consumer's position as regards the enforcement of portability, since considering non-compliance with portability as a breach of contract puts the burden of enforcement on the consumer.
- In general, the Proposed Regulation is compatible with the EU rules on Personal Data Protection. The exclusion from the scope of application of the Regulation, of online service providers who provide services without payment and do not verify the subscriber's place of residence, ensures that the Regulation will not lead to more, unjustified and disproportionate personal data processing.
- While the distinction between services provided in return for payment or without payment appears clear at first sight, some grey areas might arise. Further clarifications would enhance legal certainty.
- It shall be clarified whether and to what extent host providers fall within the scope of application of the Regulation. Since it can be assumed that the Regulation also applies to certain categories of "host providers", all the obligations imposed on service providers must also comply with Article 15 (1) of the E-commerce Directive. The obligation to enable access to the travelling subscriber cannot be understood as a general duty to monitor the subscriber's location.
- The minimum standard of effectiveness of verification means used for determining the subscriber's Member State of residence is relatively low. It is not necessary for the use of authentication means to determine the subscriber's Member State of residence with absolute certainty, but they can be relied upon if they enable the

provider to have reasonable indicators as to the subscriber's Member State of residence. Only the reasonable effectiveness of the authentication means is required and not that those means are absolutely effective.

- The Regulation enables the right holders to monitor the proper application of the conditions laid down by the Regulation by giving them the right to require the service provider to use effective means to verify that the online content service is provided in conformity with Article 3(1). It would be desirable to add that the right holders may require the service provider to use reasonable effective means to verify that the online content service is provided in conformity with Article 3(1). In any case, the exact means of verification shall be decided by the service providers themselves in light of the principle of proportionality. It would also be desirable for specific guidelines to be given to service providers (for example in a recital or in a soft law instrument), such as an indicative list of reasonably effective authentication means which, if adopted, would normally comply with the conditions of Article 3 (1).
- The portability obligation does not extend to any quality requirements applicable to the delivery of an online content service that the provider is required to deliver when providing this service in the Member State of residence, unless otherwise expressly agreed by the provider. The Regulation does not specify when the provider shall inform the subscriber of the quality of delivery of the online content service and how (in what form). Since the exception is in its substance a consumer right, more details about the obligation to provide information would be welcome (such as the fact that the information shall be given prior to the delivery of the service in a clear and visible form, etc.).
- The legal fiction of Article 4 interferes with established intellectual property rights. It has to be explored whether this provision could be considered as an unforeseeable and unfavourable interpretation for copyright holders of the scope of copyright and related rights and, as result, whether it fulfils the legality requirement in fair balancing between the protection of intellectual property (Article 17 par. 2 of the EU Charter of Fundamental Rights) and the general interest.
- It has to be explored whether the balance between copyright protection and the public interest will be considered a fair one, as regards the retroactive effect of the proposed Regulation on established property rights (existing possessions). There is not a clear and straightforward principle that prohibits the interference of the proposed Regulation's provisions with established copyright and related rights. Furthermore, it is also possible that consumer interests might prevail even against the expressed contractual will of the parties in consumer contracts. Since the legal fiction of Article 4 does not interfere with the whole bundle of economic and moral prerogatives which constitute the core of the protection awarded by copyright law, but only with a specific economic prerogative (the right to communication to the public, including the making available right), it is very likely that the interference will be considered as a control of use of property and not as a deprivation of property. Therefore, prima facie the imposition of compensation does not seem necessary. On the other hand, since the portability exception must be compatible with the three-step test, which has hitherto been interpreted with economy-oriented criteria, such an obligation cannot be absolutely excluded, especially if the scope of application of portability is not strictly defined.

# 1. INTERVENTION IN COPYRIGHT LAW: A BRIEF SUMMARY

## General Overview

Three successive phases of the evolution of copyright law within the European Union can be distinguished: the focus on the relationship between copyright and primary European Community law, the legislative harmonization which followed and a phase where the Court of Justice of the European Union has an active (or activist) role in the creative interpretation of EU copyright rules<sup>1</sup>.

As regards the legislative harmonization of copyright law, this has been achieved through the legislative instrument of the directive, and it was based on the impact of copyright issues on the single market<sup>2</sup>. Copyright law falls within the concept of "industrial and commercial property" and can, therefore, justify an exception to the free flow of goods and services<sup>3</sup>. Indeed, pursuant to Article 34 of the TFEU, the protection of industrial and commercial property is a legitimate justification for barriers to cross-border trade within the EU. In this context, territorial copyright rules related to the existence of copyright, such as national legislation on the acquisition, transfer and extinction of such rights are at first sight lawful, provided that they do not include an element of discrimination<sup>4</sup>. Furthermore, Article 36 of the TFEU cannot be relied on to justify deviations from harmonised EU legislation<sup>5</sup>.

The increase in cross-border exploitation of copyright-protected goods within the EU and the increasing economic significance of copyright law justified the highly productive legislative action of the EU in this field in the 90s<sup>6</sup>. Since 1991, the year in which the first EU legislative instrument on copyright was adopted (the Software Directive<sup>7</sup>), the EU copyright law and related rights harmonization strategy has included nine Directives<sup>8</sup>, the main effect of which has been the "upwards" approximation of national copyright laws<sup>9</sup>. The strategy of harmonization of copyright law by the use of the legislative tool of the directive, has certainly led to the proliferation of EU copyright law norms in various and dispersed copyright law issues, whereas it left the Member States a considerable margin of freedom to maintain the basic principles and the philosophy underlying their national copyright laws, as long as the result sought by the Directive was achieved. Even though the method of harmonization by directives has undoubtedly built a basic "skeleton" of

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<sup>1</sup> A. Lucas-Schloetter, *Is there a concept of European Copyright Law? History, Evolution, Policies and Politics and the Acquis Communautaire* in: I. Stamatoudi, P. Torremans (ed.), *EU Copyright Law, A Commentary*, Edward Elgar, 2014, p. 7.

<sup>2</sup> Th. Georgopoulos, *The Legal Foundations of European Copyright Law*, in: T. Synodinou (ed.), *Codification of European Copyright Law, Challenges and Perspectives*, Kluwer Law International, 2012, p. 33.

<sup>3</sup> *Joined Cases 55/80 and 57/80, Musik-Vertrieb Membran v. GEMA* [1981] ECR 147.

<sup>4</sup> European Commission, Directorate C, Regulatory Policy, *of the Enterprise and Industry DG, Free movement of goods, Guide to the application of Treaty provisions governing the free movement of goods*, 2010, p. 28.

<sup>5</sup> *Case C-473/98 Toolex* [2000] ECR I-5681; *Case 5/77 Tedeschi v Denkavit* [1977] ECR 1555.

<sup>6</sup> Lucas-Schloetter, *op.cit.*, p. 10.

<sup>7</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. The Directive was repealed and replaced by the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version)

<sup>8</sup> In addition, we could add the Enforcement Directive which is about all intellectual property rights (Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights).

<sup>9</sup> P. B. Hugenholz, *Is Harmonizing a good thing? The case of copyright acquis*, in: A. Ohly, J. Pila, *The Europeanization of Intellectual Property Law*, OUP, 2013, p. 66.

EU copyright law *acquis*, the constantly emerging new challenges to which copyright law is exposed, due to the rapid development of technology, render the use of the directive unsuitable<sup>10</sup>. In addition, many structural deficiencies of the “copyright harmonization by directives” strategy have been noted: a piecemeal effect of partial harmonization<sup>11</sup>, national discrepancies, the lack of a coherent and consolidated corpus of EU copyright norms, legal uncertainty, high licensing and transaction costs for copyright holders and users<sup>12</sup>, and more significantly, the limited potential of the directive to provide a unified copyright law which corresponds to the demands of a unified market.<sup>13</sup> In parallel, the idea of replacing national copyright laws by a European Copyright Code on the grounds of Article 118 of the TFEU, which gave the EU an explicit legal basis for an EU copyright policy<sup>14</sup>, has gained increasing support in doctrine<sup>15</sup>.

The proposed regulation is a dynamic shift towards a new legislative tactic which aims to have a stronger, full and direct effect and, if voted through, it would be the **first regulation in the field of copyright law** and related rights. On the other hand, its scope of application seeks to be narrow, since it does not reform EU copyright law as a whole, as proposed by the proponents of an EU copyright title or Code, but addresses a very specific side-effect of copyright territoriality. Specifically, the proposed Regulation aims to introduce a special copyright exception, which will enable portability for lawful subscribers to online services providing access to copyright and related rights-protected works.

## Copyright exceptions in EU copyright law

Article 5 of the Information Society Directive deals with copyright exceptions. This provision establishes a long, albeit exhaustive, list of copyright exceptions<sup>16</sup>. Member States have the discretion to keep or introduce any of these exceptions or even all of the exceptions included in Article 5, but in principle they cannot introduce or maintain exceptions which are not found on the list. Therefore, the harmonising effect of Article 5 is often considered as minimal<sup>17</sup>.

<sup>10</sup> Hugenholtz, Is Harmonizing a good thing? The case of copyright *acquis*, op.cit., p. 67.

<sup>11</sup> F. Gotzen, The European Legislator’s Strategy in the Field of Copyright Harmonization, in: T. Synodinou, Synodinou (ed.). Codification of European Copyright Law, op.cit., p. 49.

<sup>12</sup> E. Derclaye, T. Cook Trevor, An EU Copyright Code: what and how, if ever? Intellectual Property Quarterly, (2011) 3 . p. 263

<sup>13</sup> Hugenholtz, op.cit., p. 67.

<sup>14</sup> Georgopoulos, op.cit., p. 37.

<sup>15</sup> See on this issue: E. Derclaye, T. Cook Trevor, An EU Copyright Code: what and how, if ever? op.cit. · Gotzen, The European Legislator’s Strategy in the Field of Copyright Harmonization, op. cit., p. 52 · R. Hilty, Reflections on a European Copyright Codification, in: T. Synodinou (ed.). Codification of European Copyright Law, op.cit. · B. Hugenholtz, The Last Frontier: Territoriality, in: M. van Echoud, P. B. Hugenholtz, Stef van Gompel, L. Guibault and N.Helberger, Harmonizing European Copyright Law -- The Challenges of Better Lawmaking Kluwer Law International, 2009 · A. Lucas, European Copyright Codification, in: T. Synodinou (ed.). Codification of European Copyright Law, Challenges and Perspectives, op.cit., p. 374-375 · T. Synodinou, Introduction, in: T. Synodinou (ed.). Codification of European Copyright Law, Challenges and Perspectives, op.cit., p. 27

<sup>16</sup> According to Recital 32, “*This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.*”

In CJEU case law, the dogma of the restrictive interpretation of exceptions has prevailed<sup>18</sup>. Therefore, the more flexible purpose-oriented approach on exceptions, which certain CJEU judgments appear to embrace, remains marginal<sup>19</sup>. Furthermore, since the big challenge is how to construct and adapt copyright exceptions and limitations in the digital era, the so-called "grandfather clause" of Article 5 (3)(o), which appears to remove some of the inflexibility inherent in an exhaustive list of limitations<sup>20</sup>, should not be over-emphasised because it only allows Member States to retain certain exceptions in cases of minor importance, provided exclusively for analogue uses.

Copyright exceptions and limitations are also subject to the general clause of the "**three-step test**". Although in the Berne Convention the test was considered as a guiding principle for legislators in the Member States of the Union, and thus had a restricted scope of application, its incorporation in Article 5 significantly transforms its function, since it is now considered to be aimed both at legislators and at judges. In order to mitigate the use of the three-step test for further restricting the scope of application of copyright, proposals have been made suggesting alternative interpretations of the test or even its use as an enabling clause to broaden the scope of copyright exceptions<sup>21</sup>. However, as the test is also part of International Copyright law (Berne Convention, TRIPS agreement, WCT, WPPT) a new and progressive interpretation of the test would be very difficult to achieve in practice. In this context, the CJEU in ACI Adam rejected such an interpretation and held that Article 5(5) takes effect only at the time when the exceptions are applied by Member States, and it is not intended to define the substantive content of the different exceptions and limitations or to extend their scope<sup>22</sup>.

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<sup>17</sup> Chr. Geiger, Fr. Schönherr, Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions, in: T. Synodinou (ed.). Codification of European Copyright Law, Challenges and Perspectives, op.cit., p. 139.

<sup>18</sup> Geiger, Article 5, Exceptions and Limitations, in: Stamatoudi, Torremans, op.cit., p. 451

<sup>19</sup> See for example: Case C-403/08 - Football Association Premier League and Others, Judgment of the Court (Grand Chamber) of 4 October 2011.par. 164 · Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and Others, par.134.

<sup>20</sup> L. Guibault, Why Cherry-Picking Never Leads to Harmonisation, The Case of the Limitations on Copyright under Directive 2001/29/EC, JIPITEC 2010, p. 56.

<sup>21</sup> See: Chr. Geiger, R. Hilty, J. Griffiths, U. Suthersanen (2010). Declaration A Balanced Interpretation of The "Three-Step Test" In Copyright Law. Jipitec, Vol. 1. (urn:nbn:de:0009-29-26212).

<sup>22</sup> Case C-435/12 - ACI Adam and Others, Judgment of the Court of 10 April 2014, par. 25. See also: Case C-351/12 - OSA, Judgment of the Court of 27 February 2014, par.40.

## 2. PORTABILITY AND COPYRIGHT TERRITORIALITY: ENEMIES OR ALLIES?

### What does the principle of territoriality mean?

Territoriality of copyright and related rights is a well-established principle in international and European copyright law<sup>23</sup>. The principle is enshrined in the rule of national treatment which is established in Article 5 (2) of the Berne Convention<sup>24</sup> and it has been confirmed in the EU by the Court of Justice (CJEU) in its 2005 Lagardère ruling<sup>25</sup>. According to this principle, copyright law applies to and is enforceable only in the territory of the Member State that it grants it.

Therefore, despite the EU harmonisation efforts of the last 25 years, there is no uniform EU copyright law, but there are 28 individual national copyright laws which apply respectively in the territory of each Member State. National copyright laws are independent and might present significant differences. As a result, the same work can be protected in one Member State, but not in another, while divergent copyright exceptions apply within the territory of the EU.

The principle of copyright territoriality derives from the principle of national sovereignty and is considered both as a safeguard and a stimulator for “cultural diversity”. Indeed, as is highlighted by the Institute for Information Law in the Report on the “The Recasting of Copyright & Related Rights for the Knowledge Economy”, marketing cultural goods (such as books and films) in foreign countries often necessitates territorial licensing, for instance when the good needs to be customised to cater for local audiences. Furthermore, *“most collective rights management societies currently derive their existence from rights granted or entrusted to them on a national (territorial) basis, while the proceeds from the collective exploitation of these rights flow not only to entitled right holders, whereby local authors are sometimes favoured over foreign right holders, but are also channelled to a variety of cultural and social funds, mostly to the benefit of local authors and performers and local cultural development”*<sup>26</sup>.

Accordingly, copyright territoriality not only enables copyright rules to reflect the cultural tradition and trends in each individual Member State, but also sustains the local cultural economies and enables them to flourish. The existence of multiple economic players in the national cultural markets promotes pluralism in the distribution and communication channels of cultural goods, since the concentration of exclusive rights in the hands of a few powerful players situated in only a few Member States, might result in the non-accessibility of certain cultural goods to all EU territories.

<sup>23</sup> A. Peukert, Territoriality and Extra-Territoriality in Intellectual Property Law, in Gunther Handl, Joachim Zekoll, Peer Zumbansen, in: Beyond Territoriality: Transnational Legal Authority in an Age of Globalization, Martinus Nijhoff Publishers, Leiden, Boston 2012, p. 190-192.

<sup>24</sup> P. Bernt Hugenholtz, Mireille van Eechoud, Stef van Gombel, Lucie Guibault and others, Report on “The Recasting of Copyright & Related Rights for the Knowledge Economy”, Institute for Information Law, November 2006, Study commissioned by the European Commission’s Internal Market Directorate General, p. 23.

<sup>25</sup> Par. 46: “At the outset, it must be emphasised that it is clear from its wording and scheme that Directive 92/100 provides for minimal harmonisation regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory.” See also: Case C-351/12 – OSA, op.cit. par. 76.

<sup>26</sup> Bernt Hugenholtz, Mireille van Eechoud, Stef van Gombel, Lucie Guibault and others, Report on “The Recasting of Copyright & Related Rights for the Knowledge Economy”, Institute for Information Law, November 2006, p.22.

## **The debate about the pertinence of the principle of territoriality in the internal market**

Nonetheless, from a purely internal market perspective, which is the major driving force for the harmonisation of EU copyright law, the principle of territoriality appears to be an obstacle to the free movement of goods and services in the internal market, since its direct effect is the segmentation of the EU Market into 28 national markets<sup>27</sup>. The disparities caused by copyright territoriality have often been seen as a source of legal uncertainty and of high transaction, licensing and enforcement costs<sup>28</sup>. More significantly, territoriality has been denounced to a significant extent as the main obstacle to the establishment of a unified digital market in Europe<sup>29</sup>.

Indeed, the principle of territoriality is *ab initio* the antithesis of the concept of unification, since territoriality is by definition linked to the notion of barriers, and of "physical lines" having a separating, structuring or an identifying function. For the distribution of tangible goods, the doctrine of the exhaustion of the distribution right, which is a core principle of European copyright law,<sup>30</sup> enables the free circulation within the internal market of a tangible good subject to copyright protection (original work or copy) after its first sale or other transfer of ownership by the rights holder or with his consent in the territory of a Member State. So, the rights holder cannot invoke his exclusive rights to prevent the importation, export or resale of tangible goods protected by copyright law which have been put into circulation in another Member State with his consent<sup>31</sup>.

Nonetheless, even if it has been highly debated, especially after the Used Soft CJEU ruling<sup>32</sup>, no similar principle has been affirmed for intangible goods, either in the EU or internationally<sup>33</sup>. As a result, the circulation of an intangible good online throughout the EU presupposes that the service provider has obtained a licence to distribute the work online to all the countries of receipt of the service, and that, respectively, has cleared the rights in each individual Member State through territorial licensing. If such a licence has not been granted, the service provider has to apply geo-blocking to disable the online distribution to territories not covered by the licence granted to him. So, as is highlighted in the Commission's Staff Working Document "A Digital Single Market Strategy for Europe", *"Restrictions to cross-border use often originate from practices aimed at exclusive territorial protection (based on absolute exclusivity in one territory) and are more prevalent for films, TV series and sports programmes. Indeed, producers of audiovisual programmes typically grant an exclusive licence to a single distributor within a given territory. For European films and TV programmes, such an exclusive licence is commonly granted to distributors in order to obtain upfront investments that contribute to the financing of*

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<sup>27</sup> Ph. Jougoux, The plurality of legal systems in copyright law: an obstacle to a European codification?, in T. Synodinou, Codification of European copyright law: challenges and perspectives, Kluwer Law International, 2012, p. 62.

<sup>28</sup> Tambiama Madiaga, EU copyright reform: Revisiting the principle of territoriality, European Parliamentary Research Service, Briefing, September 2015.

<sup>29</sup> See for example: Orientation Debate on Content in the Digital Economy, SEC(2012) 680, Brussels, 28 November 2012: p. 4.; European Commission: White Paper - A Copyright Policy for Creativity and Innovation in the European Union, Brussels, XXX [...]2014 XXX Draft, 2014: pp. 5 – 7.

<sup>30</sup> Article 4 para. 2 establishes the rule of Community-wide exhaustion of the distribution right. Accordingly, the right is exhausted within the territory of the Community and the European Economic Area if the first sale or other transfer of ownership of an original work or of a copy of it is made by the rightsholder or with his consent.

<sup>31</sup> According to Hilty, even as regards the dissemination of tangible objects, market foreclosures remain still possible since technical protection measures may still hinder the use of tangible copies as long as it is possible to divide the internal market based on differently coded playing devices. See: R. Hilty, Reflections on a European Copyright Codification, op.cit., p. 358.

<sup>32</sup> UsedSoft GmbH v Oracle International Corp., C-128/11, Judgment of the Court of 3 July 2012.

<sup>33</sup> Recital 29 of the Directive 2001/29 appears to exclude such a possibility.

*production*<sup>34</sup>. In other words, geo-blocking appears as a necessary service restriction in order to enforce the territorial licensing economic model, which corresponds to the territorial nature of copyright and related rights. This also appears to be in line with Article 20 (2) of the Services Directive. According to this provision, companies may discriminate between service recipients on grounds of nationality or place of residence if this is justified by objective criteria, while Recital 95 of that Directive states that *"Neither does it follow that the non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory would constitute unlawful discrimination"*<sup>35</sup>. This approach has also been favoured by the Proposal on addressing geoblocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC<sup>36</sup>, where the obligation of the service provider not to apply different general conditions of access to their goods or services, for reasons related to the nationality, place of residence or place of establishment of the customer, does not extend to electronically supplied services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter.<sup>37</sup>

The goal of achieving an EU Digital Single Market is opposed to this logic. In this context, the establishment of an EU digital single market has been primarily seen as a call to abolish territoriality. Apart from the possible extension of the exhaustion doctrine to online communications, various approaches, either inside or outside the perimeter of copyright law, have been suggested in order to mollify the counteractive effects of copyright territoriality for the internal market, such as the application of the "country of origin" principle for the online communication of works<sup>38</sup> and the corrective application of EU competition law rules<sup>39</sup>, while the most maximalist thesis has been the one of replacing national copyright laws by a European Copyright Code or European Unitary Title, on the grounds of Article 118 of the TFEU<sup>40</sup>, which would have marked the end of territorial national copyright laws<sup>41</sup>.

<sup>34</sup> Commission Staff Working Document "A Digital Single Market Strategy for Europe - Analysis and Evidence", Brussels, 6.5.2015, SWD (2015) 100 final.

<sup>35</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, L 376/36, 27.12.2006. See also: Article 17 (11) of that Directive. See also: Case C-351/12 – OSA, par.64 (*"As regards the question whether Article 16 of Directive 2006/123 applies to such a service, it must be observed, first of all, that under Article 17(11) of that directive, Article 16 does not apply to copyright and to neighbouring rights."*)

<sup>36</sup> COM (2016) 289 final of 25.5.2016.

<sup>37</sup> Article 4 1 (b) of the Proposal. Specifically, according to Recital 6 *"As a consequence, the provisions of this Regulation should apply inter alia to non-audio-visual electronically supplied services, the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, subject however to the specific exclusion provided for in Article 4 and the subsequent evaluation of that exclusion as provided for in Article 9. Audio-visual services, including services the main feature of which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses, are excluded from the scope of this Regulation"*.

<sup>38</sup> This question is currently under discussion in the context of the Review of the Satellite and Cable Directive. See on this issue the Full report on the public consultation on the review of the EU Satellite and Cable Directive, 04/05/2016.

<sup>39</sup> Hugenholtz, Is Harmonizing a good thing? The case of copyright acquis, op.cit., p. 69-70.

<sup>40</sup> According to this provision *"In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements. The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament."*

<sup>41</sup> Creative Content in a European Digital Single Market: Challenges for the Future, A Reflection Document of DG INFSO and DG MARKT, 22 October 2009 p. 19: *"By creating a single European copyright title, European Copyright Law would create a tool or streamlining rights management across the Single Market, doing away with the necessity of administering a "bundle" of 27 national copyrights. Such a title, especially if construed as*

Nonetheless, it seems for the moment that this idea has not been expressed in concrete legislative steps and has been postponed for the future. Indeed, the Commission has finally opted for an admittedly less holistic approach, with a focus on very specific side-effects of copyright territoriality: geo-blocking and barriers to the portability of legally acquired content within Europe.<sup>42</sup> In the Communication of 9 December 2015 “*Towards a modern, more European copyright framework*”, the Commission’s intervention appears more reserved than announced in the Staff Working Paper of 6 May 2015, where concerns were raised both in respect of the portability of content available in the home country and as regards cross-border access to content from another Member State. Indeed, the Commission, following its familiar step-by-step strategy in the field of copyright law, has separated the issue of portability from the broader question of cross-border access to content from another Member State<sup>43</sup>. In any case, all the legislative steps announced appear to be an exception to the principle of copyright territoriality, which is still the rule. This has a significant effect on how the proposed Regulation is to be analysed, since as an exception to the rule of copyright territoriality, it must be interpreted in a way that does not reverse or substantially affect this principle.

In a similar line of thinking, the European Parliament, in resolution of 9 July 2015<sup>44</sup>, supports the Commission’s initiatives on the question of portability, within the EU, of online services for content legally acquired and made available, whilst affirming at the same time that the existence of copyright and related rights inherently implies territoriality and recalls the importance of territorial licences within the EU. As the Resolution emphasises, there is no contradiction between the principle of copyright territoriality and measures to ensure portability of content<sup>45</sup>. The Report also pinpoints that industry geo-blocking practices should not prevent cultural minorities living in EU Member States from accessing existing content or services in their own language that are either free or paid for. However, the proposed Regulation does not deal with this question.

In general, the proposed Regulation is the expression of a restrictive approach to cross-border access copyright-protected content, since it does not abrogate or negate the principle of copyright territoriality. Specifically, it appears to be a specific breach of that principle, and thus an exceptional case where the principle shall not apply. Accordingly, it covers a broad but specific range of online content services, and it addresses the needs of a special category of beneficiaries (subscriber-consumers) and not the broader issue of cross-border access to online content within the EU without territorial restrictions.

## **Territorial limitations applied by online service providers**

The provision of online content services is often subject to territorial limitations imposed by online service providers. In the majority of cases, service providers territorially limit access to services due to the fact that they do not have a license to transmit IP-protected content to every country in which the services are received. It appears that the decision to apply

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*taking precedence over national titles, would remove the inherent territoriality with respect to applicable national copyright rules; a softer approach would be to make such a Community copyright title an option for right holders which would not replace, but exist in parallel to national copyright titles”.*

<sup>42</sup> Commission Staff Working Document, A Digital Single Market Strategy for Europe - Analysis and Evidence, Accompanying the document, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final.

<sup>43</sup> “Towards a modern, more European copyright framework”, COM(2015) 626 final.

<sup>44</sup> European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society P8\_TA-PROV(2015)0273

<sup>45</sup> Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI)), 24 June 2015, Committee on Legal Affairs, Rapporteur: Julia Reda.

technological restrictions (such as geo-blocking or/and rerouting) is taken either on the service provider's own initiative in order to comply with copyright rules or, more often, due to a contractual obligation to geo-block in the contract between the provider and copyright holders. Usually, technological restrictions are combined with contractual restrictions on contracts between the online service providers and their subscribers. If geo-blocking results from an agreement (for example, when it is contractually imposed on the service provider by a licensor), this falls – in principle – within the scope of Article 101(1) of the TFEU<sup>46</sup>.

On 18 March 2016, the Commission published an initial "Issues paper" on "Geo-blocking practices in e-commerce"<sup>47</sup>. As the "Issues paper" confirms, *"With regard to online digital content, the vast majority of providers participating in the inquiry geo-blocked access to their services to users located in other Member States, mainly through an outright denial of access to the service based on IP address verification. 59 per cent of respondents state that they are contractually required by right holders to geo-block"*. But it is not clear how and on what terms geo-blocking is applied, since different practices appear to be applied, depending on the category of the online provider or the type of digital content. Indeed, as the "Issues paper" states, *"While licensing agreements on films, TV series and sports events are most likely to include such restrictions, there appear to be large differences in both the extent to which geo-blocking takes place in different Member States, and the extent to which different types of operators implement geo-blocking in relation to different categories of digital content"*.

The proposed Regulation obliges online services providers to enable access to and use of online content by subscribers who are temporarily staying in another Member State (Article 3). In parallel, Article 5 provides that any contractual agreements whose effect would be to negate the obligation of Article 3 in the contract between service providers and subscribers, shall be unenforceable. Consequently, the proposed Regulation appears to address both technological and contractual territorial restrictions imposed by service providers. Certainly, the model of territorial restrictions used by those drafting the Regulation has been a combination of technological and contractual restrictions. In any case, it has to be clear that the Regulation applies to both situations, thus even those where only technological or only contractual limitations have been applied by the service providers. In the case of technological limitations (mainly geo-blocking), the service provider has an obligation to enable access to and use of the online content service. This, in practice, means that the service providers must monitor and confirm the temporary location of the subscriber in other Member States, and that they must "disable" their geo-blocking measures. If the service provider does not apply geo-blocking, but restricts access to and use of the online content service to a particular territory (Member State) only contractually, this contractual obligation shall be unenforceable. Furthermore, in that case the provision shall be understood also in the sense that the service provider is prohibited from applying geo-blocking in the future if the subscriber is temporarily present in another Member State.

### Portability: a right, an exception or both?

One of the most controversial issues of modern copyright law is that of determining the legal nature of the exceptions to copyright law. Do they grant copyright users a simple legal right to act that is founded on permissive legal rules or do they grant real enforceable

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<sup>46</sup> B. Batchelor, Commission Publishes First Issues Paper into EU Geo-blocking, March 25, 2016, <http://kluwercompetitionlawblog.com/2016/03/25/commission-publishes-first-issues-paper-eu-geo-blocking/>.

<sup>47</sup> Commission Staff Working Document, Geo-blocking practices in e-commerce, Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition, Brussels, 18.3.2016, SWD(2016) 70 final.

rights?<sup>48</sup> Apart from Belgian copyright legislation, where all copyright exceptions are promoted to *ius cogens*<sup>49</sup>, no other national legislation in Europe declares all copyright exceptions to be mandatory.

Traditionally, searching for the position of the user in copyright law could be considered as heresy. Copyright doctrine is characterized by the absence of the user<sup>50</sup>. This controversy stems mainly from the dominant author-centered approach of European continental copyright law (the so-called “author’s right” approach). According to this approach, the natural person of the author of the intellectual creation is the cornerstone of the protection awarded. Public interest is satisfied by the establishment of strictly defined exceptions or limitations to copyright<sup>51</sup>. These exceptions or limitations are not granted in favour of a legally recognised individual entity, but in a general and abstract way in favour of the public. In other words, the end-user of the works of intellect is not recognised as an individual entity that can claim the application of exceptions or limitations to copyright. In light of the above, copyright exceptions or limitations are not traditionally considered as rights of the end-users<sup>52</sup>.

Article 3(1) of the proposed Regulation introduces an obligation for an online service provider to enable a subscriber to access and use the online content service when temporarily present in other Member States. Furthermore, Article 5 provides that any contractual provisions, including those between holders of copyright and related rights, those holding any other rights relevant for the use of content in online content services and service providers, as well as between service providers and subscribers which are contrary to Articles 3(1) and 4, shall be unenforceable.

Therefore, **portability is established as a mandatory copyright exception** that cannot be overridden by contractual terms. The advent of such a “reinforced” exception is not a novelty which is being contributed to European copyright law by the proposed Regulation. A more robust and active approach to copyright exceptions, which brings closer the “legal prerogatives” safeguarded by the exceptions to the legal nature of “rights”, has already been established in the Software<sup>53</sup> and the Database Directive,<sup>54</sup> where the rights of the lawful user of a software program or a database were recognised. Recently, in the Ryanair ruling<sup>55</sup> the CJEU affirmed the legal nature of these mandatory exceptions as “rights”. According to recital 39 of the ruling (emphasis added), “...it is clear from the purpose and structure of Directive 96/9 that Articles 6(1), 8 and 15 thereof, which establish mandatory rights for lawful users of databases, are not applicable to a database which is not protected either by copyright or by the sui generis right under that directive, so that it does not prevent the adoption of contractual clauses concerning the conditions of use of such a

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<sup>48</sup> See on this issue: T. Synodinou, The Lawful user and a Balancing of Interests in European Copyright Law, IIC 7/2010, p. 81.

<sup>49</sup> S. Dusollier, Droit d’auteur et protection des œuvres dans l’univers numérique, Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres, éditions Larcier, Bruxelles, 2005, p. 503 · L. Guibault, Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations to Copyright, Kluwer Law International, 2002, p. 219.

<sup>50</sup> J. Cohen, The place of the user in copyright law, 74 Fordham L. Rev. (2005), p. 347.

<sup>51</sup> A. Lucas, H.J. Lucas, A. Lucas-Schloetter, Traité de la propriété littéraire et artistique, 4e édition ; Lexis Nexis, Litec, 2012, p. 331, n°349 · A. Lepage, Vue générale sur les exceptions et les limitations au droit d’auteur dans l’environnement numérique, eBulletin du droit d’auteur, janvier-mars 2003, p. 5 · A. Strowel, Droit d’auteur et copyright, Divergences et convergences, Etude de droit comparé, Bruylant, Bruxelles, L .G.D.J. Paris, 1993, p. 20-21.

<sup>52</sup> Lucas, Lucas, Lucas-Schloetter, op.cit., p. 328, n°347.

<sup>53</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17.5.1991, p. 42-46.

<sup>54</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20-28.

<sup>55</sup> Ryanair Ltd v PR Aviation BV, Judgment of the Court of 15 January 2015, Case C- 30/14.

*database". The Court is more explicit in recital 40 which states "That analysis is supported by the general scheme of Directive 96/9. As Ryanair and the European Commission have stated, that directive sets out to achieve a balance between the rights of the person who created a database and the rights of lawful users of such a database, that is third parties authorised by that person to use the database..."*

It is undeniable that the attribution of a mandatory character to exceptions or limitations to copyright injects a new perspective into copyright exceptions. It is a point of approach of copyright exceptions with the legal nature of "rights". Indeed, determining a distinct legal subject, the person of the "lawful user", who can claim the application of copyright exceptions and the recognition of the exceptions as "legal prerogatives" of the lawful user, which cannot be overridden by the contractual will, marks the advent of a new more active approach to copyright exceptions in EU copyright law. In light of this evolution, a new category of "legal prerogatives" also emerges: the "rights of the lawful user". These "rights" could be considered as legal hybrids between exceptions and rights.

Even though not expressly qualified as a "lawful user's right" or a "consumer's or subscriber's right", the obligation of portability which is established by the proposed Regulation, takes the form of a personal right in favour of a consumer. Furthermore, it presents the two essential features of a lawful user's right. First, it is not established generally in favour of the public, but in favour of a specific and distinct legal subject: the subscriber-consumer of an online content service who, on the basis of a contract for the provision of an online content service with a provider, may lawfully access and use such service in his Member State of residence. Secondly, portability is fully guaranteed against opposing contractual terms and cannot be overridden by the contractual will. The qualification of portability as a legal hybrid between exception and right has concrete consequences. Portability, as a lawful user right, shall be fully guaranteed and enforced both against contrary contractual terms and technological measures of protection (geo-blocking) which prohibit the beneficiary ("the subscriber") from having access to and using the online service, when temporarily present in another Member State. The establishment of a positive obligation for service providers to enable portability is in line with this approach. Furthermore, portability, as a mandatory exception, shall be interpreted restrictively and is subject to the three-step test.

The Regulation does not stipulate how portability shall be enforced in the event of a violation of Article 3 (1) by the service provider. However, this could be a source of legal uncertainty for national copyright laws. Certainly, it could be argued that the margin of discretion left to the Member States respects the territorial national copyright traditions which have thus far only been harmonised and not unified. As a result, each national copyright law will "place" and "qualify" the portability obligation in a way that is compatible with the principles and philosophy of national copyright law.

Indeed, expressly introducing portability as a "user" or "consumer" right would appear at first sight to be a "retreat" from the continental author's rights tradition, which denies the recognition or multiplication of user rights. On the other hand, sanctioning the non-performance of the portability obligation only as a breach of contract by the online service provider leaves the burden of enforcement of the portability obligation to the consumer. Since the proposed Regulation has not expressly opted for a clear mechanism for safeguarding portability against the service provider, it appears to discreetly favour the second option.

### **3. THE EXACT SCOPE OF APPLICATION OF THE PORTABILITY RIGHT: WHAT KINDS OF SERVICES ARE COVERED?**

#### **The criterion of the main purpose/feature of the service**

The proposed Regulation has a broad scope of application. It applies to an "online content service" that is provided lawfully by a service provider on a portable basis, and is an audiovisual media service within the meaning of Directive 2010/13/EU<sup>56</sup>, or a service, the main feature of which is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations, whether in linear or non-linear format.

In this context, the Regulation's scope is not restricted only to audiovisual services (both linear and on-demand), but covers every service which provides access to any type of works: e-books, games, images, sport content and news sites. Platforms such as Netflix or iTunes are also covered.

Since there is a reference to the concept of "an audiovisual media service within the meaning of Directive 2010/13/EU", this must also be understood in accordance with the CJEU's interpretation of the concept of "audiovisual media service within the meaning of Directive 2010/13/EU"<sup>57</sup>. (CJEU, judgment of 21 October 2015, Case C-347-14 – New Media Online<sup>58</sup>).

In both cases (audiovisual media service within the meaning of Directive 2010/13/EU or a service, the main feature of which is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations), it appears that the main element that distinguishes the services covered by the Regulation from those that are not covered is the main/principal "purpose" or "feature" of the service (either the provision of a "programme" in the case of audiovisual media services within the meaning of Directive 2010/13/EU or "the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations"). Therefore, services not aiming to offer an audiovisual programme in a way comparable to the form and content of TV broadcasting (for example, providing a video or a photograph as a complement to a newspaper journalistic article which is published online) are not covered. Furthermore, the Regulation does not apply to services which use works or other protected subject matter or transmissions of broadcasting organisations in an ancillary manner (such as graphical

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<sup>56</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services OJ L 95, 15.4.2010, p. 1

<sup>57</sup> "Audiovisual media service" means: (i) a service as defined by Articles 56 and 57 TFEU which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;"

<sup>58</sup> "The concept of 'programme', within the meaning of Article 1(1)(b) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), must be interpreted as including, under the subdomain of a website of a newspaper, the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips.

2. On a proper interpretation of Article 1(1)(a)(i) of Directive 2010/13, assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper must focus on whether that service as such has content and form which is independent of that of the journalistic activity of the operator of the website at issue, and is not merely an indissociable complement to that activity, in particular as a result of the links between the audiovisual offer and the offer in text form. That assessment is a matter for the referring court."

elements or music used where the main purpose of the website is not the provision of such works, but others, such as, for example, the sale of goods<sup>59</sup>).

In any case, the concepts of “*principal purpose*” (for an audiovisual media service within the meaning of Directive 2010/13/EU) and “*main feature*” (other services providing access to works, other protected subject matter or transmissions of broadcasting organisations) must be considered as equivalent.

The proposed regulation shall also take into consideration the latest developments concerning the review of Directive 2010/13/EC. Indeed, as regards the definition of an audiovisual media service, the Proposal for a Directive amending Directive 2010/13/EU states that “audiovisual media service” means: “(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;”. This definition appears to be in line with the findings of the CJEU in Case C-347-14 - *New Media Online*, which has already been cited. Moreover, additional definitions are introduced, such as the definition of 'video-sharing platform service', 'user-generated video' and 'video-sharing platform provider'<sup>60</sup>. This might be highly relevant for host providers who also might be deemed to fall within the scope of application of the proposed Regulation.

## Portability and host providers

The proposed regulation introduces a definition of online service providers to which its provisions apply. While it is clear that service providers which act as “editors” in the provision of online content are covered (audiovisual media service within the meaning of Directive 2010/13/EU or a service, the main feature of which is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations), it is less clear to what extent and under what terms host providers fall within its scope of application. This is also due to the fact that many online service providers assume both roles either for all their services or for specific online content services. This is also pinpointed in the Commission’s recently published “Issues paper” on “Geo-blocking practices in e-commerce”, where it is affirmed that the delineation between the activities of the service providers is not always clear-cut<sup>61</sup>.

Since it can be assumed that the Regulation also applies to certain categories of “host providers”, all the obligations imposed on the service providers by this Regulation must also comply with Article 15 (1) of the E-commerce Directive<sup>62</sup>. According to this provision, “*Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.*”

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<sup>59</sup> Recital 14 of the Proposed Regulation.

<sup>60</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, 25.5.2016, COM(2016) 287 .

<sup>61</sup> Commission Staff Working Document, Geo-blocking practices in e-commerce, Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition, op.cit, p. 15.

<sup>62</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17/07/2000, p.1.

In the classic case of audiovisual media services within the meaning of Directive 2010/13/EU, the online content will be communicated to the public by the service provider ("editor") and not by the users. Nonetheless, in the case of services, the main feature of which is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations, it might be that online content is published by users of the services. In these cases, the posting of content by users on the online platform would normally cover the whole world, if the user has not specifically restricted access to a specific content to a specific territory. Indeed, by analogy to the line of reasoning in the Svensson case, it could be argued that "*the public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them*"<sup>63</sup>. However, if the user has expressly and specifically imposed territorial restrictions, the service provider (host provider) shall normally respect the right holder's will, and consequently the content shall not be accessible to the territories for which the right holder (user) has not provided authorization. This, for example, could occur when a TV channel is hosting content on an online platform and has imposed territorial restrictions in respect of all or part of this content. The online content service provider shall block access to the content posted by users in these territories, on the grounds of the location of users who have access to the online content services. In order to do so, the service provider shall monitor and verify the location of the users of its services. This means that even if the service is provided without payment, it falls within the scope of application of the proposed Regulation. The service provider shall comply with the obligations imposed by Article 3 and verify the location of users in order to check their temporary presence in another Member State. This might be seen as incompatible with the fundamental rule established by Article 15 of the E-commerce Directive.

### **The crucial distinction between services provided in return for payment of money or without payment of money**

Apart from the criterion of the main purpose/feature of the service, the proposed Regulation introduces a significant distinction between online content services, whereby the main criterion of differentiation is whether the service is provided in return for payment of money or not.

Specifically, the proposed Regulation covers any service which is provided to a subscriber on agreed terms either in return for payment of money or without payment of money, provided that the subscriber's Member State of residence is verified by the provider.

While the distinction between services provided in return for payment or without payment appears clear at first sight, some grey areas might arise. Indeed, there are some online services (providing mainly videogames) where the user/subscriber does not have to pay to subscribe to the service, but payment is requested at a later stage if the subscriber chooses to buy additional "features" (music, characters, virtual weapons and abilities, etc.). In this case, even if the classic model of subscription in return for payment is not followed, additional services are provided at a later stage on upon payment. For reasons of clarity and to dissipate any doubt, it would be appropriate to include this kind of service in the category of online content services provided in return for payment.

Furthermore, it also needs to be clarified that the Regulation applies only in cases where payment is made to the online service provider by the subscriber. Indeed, it might be that an online content service is offered without payment being due to the service provider, and without an effective mechanism of verification of the user's/subscriber's identity and

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<sup>63</sup> Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, Case C- 466/12, Judgment of 13 February 2014, par. 26.

location by the service provider, where the service provider offers online content (for example an online video game) and the users can buy and sell in return for payment, virtual abilities or items related to the videogame. In this case, normally the Regulation shall not apply. However, if the service provider receives commission fees for acting as an intermediary regarding these sales between its subscribers, a payment is made to him and the situation might change, since the nature of the service ("without payment") is altered.

The Regulation introduces a differentiation of service providers based on whether the service is provided in return for payment of money (and, therefore, it falls within the scope of application of the Regulation) or services without payment of money, on condition that the provider verifies the subscriber's Member State of residence. In the second case, it appears that verification or not of the subscriber's Member State of residence by the provider becomes a substantial criterion for the inclusion or exclusion of an online content service providing the service without payment of money, in/from the scope of application of the proposed Regulation.

The distinction acts as a protective shield for the provider of an online service without payment and without a user registration mechanism, as applies for example to Google or Youtube. In this case, the Regulation simply does not apply. For instance, Youtube will not have an obligation to provide access to a Youtube video which is accessible only in a specific country or in another Member State, even if the user can prove that he is only temporarily present there. The same applies also to Google. Google.com determines the user's location, and automatically redirects the user to the local portal, often generating different, local search results<sup>64</sup>. A Google user travelling to another Member State cannot claim on the grounds of the Regulation to have access to the same Google results as in the country of his habitual residence when temporarily present in another Member State.

This exemption is justified on the grounds of the principle of proportionality. First, obliging the service providers, when they do not already do so, to verify the Member State of residence of their service users and to monitor their temporary presence in other Member States would significantly interfere with their freedom to conduct business (Articles 16 and 17 of the EU Charter of Fundamental Rights). This is clearly stated in Recital 17, which provides as follows: *"Online content services which are provided without the payment of money and whose providers do not verify the Member State of residence of their subscribers should be outside the scope of this Regulation as their inclusion would involve a major change to the way these services are delivered and involve disproportionate costs"*.

Secondly, this exception is compatible with the EU mechanism and principles on personal data protection. It would certainly not have been proportional to oblige every service provider to monitor and record the location of the users of its services. On the contrary, in the case of services provided in return for payment, it can be assumed that the subscriber ("data subject") has already communicated the relevant necessary personal data for the conclusion of the contract of subscription to the service and that the subscriber has contractually agreed to the processing of this personal data for the proper performance of the contract.

While the combination of the above two criteria (the provision of works or other protected subject matter as the main feature of the service and provision of the service without payment) will normally exclude the application of the Regulation to on-line applications which produce some content for their users (such as interactive applications providing training programmes, diets, horoscopes, etc.) since these will not normally constitute "works" or other protected subject matter, some grey areas cannot be excluded as there is no uniform definition of the concepts of "work" and "joint-work" (for content produced with user input and a software application) in European copyright law.

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<sup>64</sup> Natali Helberger, Refusal to Serve Consumers because of their Nationality or Residence - Distortions in the Internal Market for E-commerce Transactions? Briefing Note (IP/A/IMCO/IC/2006-207), EU Parliament, DG INTERNAL POLICIES OF THE UNION, Policy Department Economic and Scientific Policy, January 2007.

Since many of these applications are provided without payment, normally the proposed Regulation will not apply. However, there might be cases where the service processes and verifies the IP address of the subscriber either as an obligation or as an option. Recital 17 of the proposed Regulation provides that one possible means of authentication of the subscriber's Member State of residence is the IP address. Even though in such cases, it is not certain whether the processing of the IP address is used to determine the subscriber's Member State of residence, this shall not be excluded. In such a scenario, these services will also fall within the scope of the Regulation. In any case, Recital 17 provides that these means shall be relied upon, if they enable the service provider to have reasonable indicators as to the Member State of residence of its subscribers. So, it appears that it is not necessary for the use of such means, such as the IP address, to determine the subscriber's Member State of residence with absolute certainty.

## 4. AUTHENTICATION

### Determining the subscriber's Member State of residence

Recital 17 of the regulation leaves the providers freedom to choose the means of verification of the subscriber's Member State of residence. It provides only a list of possible indicators of authentication means: payment of a licence fee for other services provided in the Member State of residence, the existence of a contract for internet or telephone, IP address or other means, but the list is not exhaustive. As has already been mentioned, it is not necessary for the use of these means to determine the subscriber's Member State of residence with absolute certainty, but they can be relied upon if they enable the provider to have reasonable indicators as to the subscriber's Member State of residence.

So, only the reasonable effectiveness of the authentication means is required and not that the means should be absolutely effective.

The minimum standard of verification established in Recital 17 is relatively low. Recital 17 refers broadly also to "other means" of authentication, so every means which enables the provider to have reasonable indicators as to the subscriber's Member State of residence could be acceptable. On the other hand, means which do not meet the standard shall be excluded. In this context, the Regulation shall not normally apply to services provided without payment which merely require registration (for example, an online platform) where the subscriber has to declare - but not prove - his place of residence. Moreover, since the verification means shall enable the provider to have reasonable indicators as to the Member State of residence of its subscribers, it might be that more than one verification means will be necessary in order to reach the Regulation's standard. When the subscriber's Member State of residence is determined through the submission of documents, it is also crucial that those documents are updated regularly. For example, the standard of the Regulation could call for these documents to be updated regularly (for example, once every 2 years).

Furthermore, it might be that the service providers collect some data on their subscribers, but not with the clear or direct purpose of verification of their subscribers' Member State of residence (for example, they collect the IP address of their subscribers, their nationality, and information about the town where they live, for the purpose of displaying advertisements or sending promotional offers). If the data processed by the provider can enable the provider to have reasonable indicators as to the Member State of residence of its subscribers, it is not clear whether the Regulation shall apply in such situations. On the other hand, obliging the subscriber to submit such documents might jeopardize the functioning of certain services provided without payment, which allow them to be used either anonymously, or with the use of a pseudonym, and without providing a certified address. In these cases, the providers of services provided without payment must verify the subscriber's Member State of residence in order to be able to provide their subscribers with the right to portability, if they decide to do so. Even though the service providers are free to decide whether they will change their business model in order to provide their subscribers with the privilege of portability, if they choose to do so, they will have to abandon practices which allow anonymity online. In other words, in such cases, the obligation to submit utility documents in order to be granted the portability right is not in line with the protection of anonymity online<sup>65</sup>.

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<sup>65</sup> See on this issue the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 22 May 2015. As it is stated (p.19, 20):" 56.Encryption and anonymity, and the security concepts behind them, provide the privacy and security necessary for the exercise of the right to freedom of opinion and expression in the digital age. Such security may be essential for the exercise of other rights, including economic rights, privacy, due process, freedom of peaceful assembly and association, and the right to life and bodily integrity. Because of their importance to the rights to freedom of opinion and expression,

## **The *ratio legis* of the control of the providers' verification means by right holders**

The Regulation enables right holders to require that the service provider makes use of effective means in order to verify that the online content service is provided in conformity with this Regulation<sup>66</sup>. According to Article 5(2) *"Notwithstanding paragraph 1, holders of copyright and related rights or those holding any other rights in the content of online content services may require that the service provider make use of effective means in order to verify that the online content service is provided in conformity with Article 3(1), provided that the required means are reasonable and do not go beyond what is necessary in order to achieve their purpose"*.

The whole mechanism of the Regulation is justified by its exceptional nature in the sense that the principle of territoriality is not abrogated and that the portability right is not granted on an unlimited basis for every use of the online content service within the EU, but only for uses of the service where the subscriber is temporarily present in another Member State. Indeed, portability is constructed as a legal hybrid (copyright exception and subscriber's right), which is subject to the three-step test.

In this context, the aim of this provision is to safeguard the proper fulfilment of this condition. If the service providers do not verify both the Member State of residence and the Member State of temporary presence of the subscriber, then the special and "exceptional" character of this personal consumer right is not justified. Therefore, the Regulation enables the right holders to monitor the proper application of the conditions laid down by the Regulation by giving them the right to require that the service provider make use of effective means in order to verify that the online content service is provided in conformity with Article 3(1).

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*restrictions on encryption and anonymity must be strictly limited according to principles of legality, necessity, proportionality and legitimacy in objective...60. In addition, States should refrain from making the identification of users a condition for access to digital communications and online services and requiring SIM card registration for mobile users. Corporate actors should likewise consider their own policies that restrict encryption and anonymity (including through the use of pseudonyms).*"Available at:

<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx>.

<sup>66</sup> Recital 23.

## 5. THE BENEFICIARIES OF THE PORTABILITY RIGHTS

### Effective means of verification of the subscriber's location

The standard of effectiveness of the authentication means is not expressly fixed by the Regulation. Two questions might arise. Firstly, what is an effective means of verification? The question of "effectiveness" has been raised in European copyright law, both in respect of the prohibition of the circumvention of technological protection measures in Directive 2001 and in respect of the question of blocking injunctions in IP infringements<sup>67</sup>. In both cases, the standard of "effectiveness" has been interpreted flexibly as being "reasonably" effective, while it has also been affirmed that a standard of absolute or complete effectiveness is not achievable. Furthermore, as has already been analysed, the proposed Regulation sets a standard for the acceptable and appropriate means of determining the subscriber's Member State of residence, which can be used by the service provider (these means "*can be relied upon if they enable the provider to have reasonable indicators as to the Member State of residence of the subscriber*"). It appears that the standard is not absolute and it is based on what is a reasonable possible indicator as to the subscriber's Member State of residence.

In light of the above, it would be desirable to add that the right holders may require that the service provider make use of reasonable effective means in order to verify that the online content service is provided in conformity with Article 3(1). Since there are two conditions for the application of the portability right ((a) subscriber/consumer having his habitual residence in a Member State X who b) has a temporary presence in a Member State Y) the service provider shall verify both where the habitual residence of the subscriber/consumer is and the fact of his/her temporary presence in another Member State. The means of verification for both might not be the same, since in the first case the Regulation enables the service providers to verify the subscriber's residence on the basis of submission of utility documents, while in the second case the verification of the temporary presence in another Member State normally presupposes the use of geolocalisation tools, such as monitoring of the IP address or using cookies which permit the localisation of the subscriber in a Member State.

In any case, the exact means of verification shall be decided by the service providers themselves in light of the principle of proportionality, since any verification shall not go beyond what is necessary to verify the residence or the presence of a subscriber in a given Member State. This is also confirmed by recital 23 of the proposed Regulation, which states as follows: "*It is necessary, however, to ensure that the required means are reasonable and do not go beyond what is necessary in order to achieve this purpose. Examples of the necessary technical and organisational measures may include sampling of IP address instead of constant monitoring of location, transparent information to the individuals about the methods used for the verification and its purposes, and appropriate security measures. Considering that for purposes of the verification what matters is not the location, but rather, in which Member State the subscriber is accessing the service, precise location data should not be collected and processed for this purpose. Similarly, where authentication of a subscriber is sufficient in order to deliver the service provided, identification of the subscriber should not be required.*"

A second question, which is also raised due to the flexibility in respect of the means of verification, is the risk of various right holders asking for different means of verification.

<sup>67</sup> See: Case C-314/12 - UPC Telekabel Wien, Judgment of the Court of 27 March 2014.

This could put Internet service providers in a delicate position, since they might be called on to comply with divergent standards of effectiveness, depending on the right holder<sup>68</sup>.

IP address-based control of the location is known to have some flaws. It is a matter of discretion to be determined, whereas the enforcement of this new legal framework in practice implies the installation of more sophisticated tools such as proxy or VPN (Virtual Private Network) detection programs. Furthermore, an online service provider who does not comply with the minimum requirement of effectiveness as regards the means of locating subscribers could be held liable for negligence.

Therefore, it would be desirable for specific guidelines to be given to service providers (for example in a recital or in a soft law instrument), such as an indicative list of reasonably effective authentication means which, if used, would normally comply with the conditions laid down by Article 3(1).

### **The prerequisite of a consumer contract**

The portability exception acts in favour of persons who have lawfully acquired access to services (lawful subscribers to the service) on the basis of a contract. What constitutes conclusion of a contract is going to be judged on the grounds of the national provisions of the contract law of each Member State. Nonetheless, the proposed Regulation excludes some acts from this definition. According to Recital 13, a registration to receive content alerts or a mere acceptance of HTML cookies should not be regarded as a contract for the provision of online content service for the purposes of this Regulation. Furthermore the portability exception does not apply to subscribers who are not consumers (Article 2 (a))”.

### **The criterion of “temporary presence” in another Member State under the scope of the three-step test**

The proposed Regulation introduces an obligation for online service providers to enable subscribers who are temporarily present in a Member State to access and use the online content service. A key element of the proposed Regulation is the definition of the terms “Member State of residence” and “temporarily present”, since the scope of application of the portability right depends on the interpretation of these terms.

Indeed, since the proposed Regulation introduces a mandatory copyright exception in favour of the lawful users (subscribers) of online services, the exception must be precise in order to pass the three-step test. This is crucial both at a European and an international level. The three-step test is both a European copyright law (Article 5 par. 5 of Directive 2001/29) and international copyright law norm (Article 9 (2) of the Berne Convention, Article 10 of the WIPO Copyright Treaty, Article 16 of the WIPO Performances and Phonograms Treaty and Article 13 of the TRIPS agreement). Since much of the online content provided through the services belongs to non EU right holders (mainly US), an excessive interpretation of these terms could act against the qualification of the new exception as a certain special case and disrupt international trade. Indeed, according to the test, an exception must be a “certain special case”, it “must not conflict with the normal exploitation of the work” and must not unreasonably prejudice the legitimate interests of the author or other right holder. In respect of the first condition (“a certain special case”), the WTO panel, in the only case where the compatibility of a copyright exception with the three-step test was examined<sup>69</sup>, interpreted this condition as follows: “6.112 *In our view, the first condition of Article 13 requires that a limitation or exception in national legislation*

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<sup>68</sup> Association of Commercial Television in Europe, How to make portability work, February 2016, available at: <https://www.ceps.eu/sites/default/files/160215%20ACT%20-%20How%20to%20make%20portability%20work.pdf>.

<sup>69</sup> Report of the Panel, WTO Document WT/DS 160/R, 15 June 2000, available at [www.wto.org](http://www.wto.org).

*should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute. However, public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition". However, as the panel decision stressed, "...there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.<sup>70</sup>"*

So, the portability exception shall be clearly defined and narrow both "in quantitative as well as a qualitative sense"<sup>71</sup> in its scope and reach. Accordingly, in order to remain an exceptional special case, the circle of the beneficiaries of the portability exception shall not only be clearly defined, but it shall also be construed narrowly. So, the estimated total number of beneficiaries shall not amount to a large total, thereby reversing the status of the provision as an exception and establishing portability as a rule in all cases. While it is not possible to calculate the exact number of beneficiaries, the proposed provision shall be defined in a way compatible with the three-step test.

The proposed Regulation does not define the term "Member State of residence" and defines the term "temporarily present" as "*a presence of a subscriber in a Member State other than the Member State of residence*". There are no quantitative limits on the number of days of presence in a Member State other than the Member State of residence which qualify as "temporary presence". Therefore, the portability exception is applicable to every person in the EU moving/travelling temporarily from his own Member State of residence to another Member State for an undefined period of time. The proposed Regulation also leaves a great deal of freedom to service providers in respect of the means of verification of the subscriber's Member State of residence, referring to the following as possible indicators of residence: the existence of a contract for internet or telephone, IP address or other means of authentication.

The EU legislator's decision to opt for flexibility is at first sight understandable, since it would be complicated and burdensome in its application, - even though it could make the exception more "certain" - to set fixed time periods (for example, a fixed number of days abroad per stay or per year) which qualify as temporary presence. Indeed, temporary presence in another Member State might involve frequent visits at various times during the year, and a numerical fixed restriction (for example, a maximum of X days in a row, combined with a maximum of X months of presence outside the Member State of residence during a given year) would be complicated for service providers to apply.

Moreover, such a restriction is not justified by the purpose of the portability exception, which is ultimately to enable a lawful subscriber to access the online content service they have lawfully purchased wherever they are located within the EU, provided that their presence in this other Member State is not permanent. This flexible approach is also in line with the CJUE's line of reasoning in the Football Premier League case,<sup>72</sup> where it was held that "*On a proper construction of Article 56 TFEU:- that article precludes legislation of a Member State which makes it unlawful to import into and sell and use in that State foreign*

<sup>70</sup> Par. 6.108, op.cit.

<sup>71</sup> "*The term "special" connotes "having an individual or limited application or purpose", "containing details; precise, specific", "exceptional in quality or degree; unusual; out of the ordinary "or "distinctive in some way". This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective."*

<sup>72</sup> C-403/08 - Football Association Premier League and Others, Judgment of the Court (Grand Chamber) of 4 October 2011.

*decoding devices which give access to an encrypted satellite broadcasting service from another Member State that includes subject-matter protected by the legislation of that first State;- this conclusion is affected neither by the fact that the foreign decoding device has been procured or enabled by the giving of a false identity and a false address, with the intention of circumventing the territorial restriction in question, nor by the fact that it is used for commercial purposes although it was restricted to private use. 4. The clauses of an exclusive licence agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition prohibited by Article 101 TFEU where they oblige the broadcaster not to supply decoding devices enabling access to that right holder's protected subject-matter with a view to their use outside the territory covered by that licence agreement".*

Since portability is subject to the regime of copyright and related rights exceptions, the rule shall be construed narrowly and shall stay an exceptional case. This means that the exception cannot apply to situations where the criterion of "temporary presence" is abused. A parallel could be drawn with the final agreement reached on 30 June 2015 for the end of roaming charges in respect of "permanent roaming", where the rules prevent abusive and unusual uses (for example, if the customer buys a SIM card in another EU country where domestic prices are lower, in order to use it at home; or if the customer stays abroad permanently with a domestic subscription in his home country<sup>73</sup>). In that case, a fair use safeguard is applicable in the sense that once that limit is reached while abroad, a small basic fee can be charged.

By analogy, it must be clear that the Regulation does not tolerate or indirectly permit such abusive practices. While a similar mechanism (imposing an additional charge on a subscriber who has not played fairly with the rules) appears complicated and burdensome to apply, the proposed Regulation shall clarify that once the "Member State of residence" has been verified (for example by the use of a utility document), that only a presumption is created as regards the subscriber's Member State of residence. This presumption could be reversed by the service provider, if an "abnormal" and "unusual" temporary presence in another Member State is noticed by the service provider. In that case, the service provider shall have the right not to enable or the right to terminate portability, after serving a reasonable period of notice on the subscriber.

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<sup>73</sup> European Commission - Fact Sheet, Roaming charges and open Internet: questions and answers, Brussels, 30 June 2015, [http://europa.eu/rapid/press-release\\_MEMO-15-5275\\_el.htm](http://europa.eu/rapid/press-release_MEMO-15-5275_el.htm).

## 6. THE CONTENT AND AMBIT OF THE PORTABILITY RIGHT

### The legal fiction of Article 4

Articles 3 and 4 of the proposed Regulation define the scope and content of portability, which is constructed as a consumer right. According to these provisions, the provider of an online content service shall enable a subscriber who is temporarily present in a Member State to access and use the online content service. The use of the broad terms “access” and “use” is pertinent, since this will normally cover both situations where the users are prevented from accessing online content that they lawfully purchased in one Member State when temporarily present in other Member States, but also to “use”, such as playing, digital content that they lawfully downloaded in a Member State when temporarily present in other Member States<sup>74</sup>.

It is noteworthy that this obligation does not extend to any quality requirements applicable to the delivery of an online content service that the provider is subject to when providing this service in the *Member State of residence, unless otherwise expressly agreed by the provider*. Article 3 (3) states that *“The provider of an online content service shall inform the subscriber of the quality of delivery of the online content service provided in accordance with paragraph 1”*. Nonetheless, the provision does not specify when the provider shall inform the subscriber of the quality of delivery of the online content service and how (in what form). Since the exception is in substance a consumer right, more details about the obligation to provide information would be desirable (such as the fact that the information shall be given prior to delivery of the service, in a clear and visible format, etc.).

One of the biggest innovations of the proposed exception lies in the legal fiction which is introduced by Article 4. According to this provision, *“The provision of an online content service to, as well as the access to and the use of this service by, a subscriber, in accordance with Article 3(1), shall be deemed to occur solely in the Member State of residence including for the purposes of Directive 96/9/EC, Directive 2001/29/EC, Directive 2006/115/EC, Directive 2009/24 and Directive 2010/13/EU”*. In other words, the act of communication to the public and of the receipt of the service shall be deemed to occur solely in the Member State of the subscriber’s residence and not in the place where it physically occurs (the Member State where the consumer is “temporarily” present). This means that from the moment that these acts have been authorized by the right holders for the subscriber’s Member State or residence, this initial authorization will cover every subsequent act covered by copyright or related rights or by the database *sui generis* right (which is made either by the service provider or by the subscriber for having access to the service) which occurs in the Member State in which the subscriber is temporarily present. This provision is necessary to ensure that neither the service provider nor the subscriber breach copyright law, related rights and the database *sui generis* right when offering the online content service or when receiving the online content service outside the Member State in which the subscriber is resident.

Such legal fictions are exceptional, but certainly not unknown in European copyright law. Examples of analogous “legal fictions” in European copyright law are Article 1 (2) (b) of the Satellite and cable Directive<sup>75</sup> (*“(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth”*)

<sup>74</sup> For these kinds of restrictions see: Commission Staff Working Document , Geo-blocking practices in e-commerce, Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition, Brussels, 18.3.2016, SWD(2016) 70 final, p. 18.

or even the Svensson ruling's<sup>76</sup> legal presumption that "*... where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.*"

The legal fiction covers copyright, related rights and database *sui generis* rights, but not other intellectual property rights, such as trademarks. This means that if the right to exclusively use the logo (protected trademark) of a TV station in a Member State A has been granted to a company A, the presentation of that logo in Member State B, where the right to use the same logo (trademark) has been granted exclusively to company B, is incompatible with the exclusive use of that logo in Member State B by company B, since the legal fiction does not cover this case too. Even if this might be an exceptional case, it should also be taken into consideration since it might be a source of complications as regards the application of portability.

Intellectual property rights are protected as property by the European Convention on Human Rights<sup>77</sup>. Since this legal fiction interferes with established intellectual property rights, it has to be explored whether this provision could be considered as an unforeseeable (and unfavourable for copyright holders) interpretation of the scope of copyright and related rights and<sup>78</sup>, as result, whether it fulfills the legality requirement in the fair balancing between intellectual property (Article 17 par. 2 of the Charter) and the general interest.

### **The service providers' enforcement obligation: evasive or effective?**

On the other hand, one of the most significant weaknesses of the proposed provision can be found in the fact that the Regulation does not define either the legal nature of the service provider's obligation to enable a subscriber who is temporarily present in a Member State to access and use the online content service or the legal consequences (type and form of "penalty") for the service provider if the provider does not enable portability of the online content service. Furthermore, it is not clear whether the service provider shall automatically enable portability of the service when the presence in another Member State is technically noted (via the IP address) or whether the subscriber shall or may inform the service provider accordingly. In any case, the first option appears more logical, since it would be burdensome for the consumer to "report" their temporary stay in another Member State to the service provider.

However, portability may mean loss of quality of the service and the automatic application of portability could result in some misunderstanding on the part of the consumer. Article 3 (3) deals with this question. According to this provision, "*The provider of an online content service shall inform the subscriber of the quality of delivery of the online content service provided in accordance with paragraph 1*". This could be understood as the introduction of an additional obligation to inform the user the activation of portability.

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<sup>75</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

<sup>76</sup> Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, Case C- 466/12, Judgment of 13 February 2014.

<sup>77</sup> See: Dima v Romania, App. No, 58472/00 · Melnychuk v Ukraine, App. No. 287343 · Anheuser-Busch Inc. v Portugal, App. No, 73049/01.

<sup>78</sup> As Griffiths and McDonagh note, "*in the case of an unforeseeable unfavourable interpretation of the scope of an intellectual property right or of an exception to that right, a right-holder may be entitled to rely upon Art 17 (2) in objecting to that interpretation*". See: J. Griffiths, L. McDonagh, Fundamental Rights and European IP law: the case of Article 17 (2) of the EU Charter, in: Chr. Geiger (ed.), Constructing European Intellectual Property, Achievements and New Perspectives, Edward Elgar, p. 90.

Furthermore, since portability also takes the form of a consumer right (a lawful subscriber right that cannot be contractually overridden), it goes without saying that the consumer shall even have the right to self-help, thus to “circumvent” or bypass technical territorial restrictions in order to access the service in the Member State where he is temporarily present (for example by using a proxy server indicating an IP address in the Member State of residence) if the service provider does not enable the provision of service abroad.

In any case, Recital 18 makes it clear that the service provider is obliged to provide the online content service without deliberately technically or/and contractually “downgrading” it or restricting it, when the latter is offered in another Member State. As is stated: “*Any action by a service provider which would prevent the subscriber from accessing or using the service while temporarily present in a Member State, for example restrictions to the functionalities of the service or to the quality of its delivery, would amount to a circumvention of the obligation to enable cross-border portability of online content services and therefore would be contrary to this Regulation*”. This provision must be read in conjunction with Article 3 and Recital 19 of the proposed Regulation. The latter sets the acceptable and appropriate quality standard of delivery of the service when the latter is provided in another Member State on the grounds of the Regulation. This is “*the quality available via the local online access chosen by a subscriber while temporarily present in another Member State*”.

Some additional explanations of the mechanisms of enforcement of the portability right would be beneficial to the effectiveness of the Regulation. One solution would be to consider the denial of access to the service, in violation of the right to portability, as a breach of contract. Since the proposed Regulation does not expressly opt for another solution, an implied reference to this mechanism could be assumed. However, sanctioning non-performance of the portability obligation only as a breach of contract by the online service provider leaves the burden of enforcement of the portability obligation on the consumer. In this context, the service providers’ positive obligation to enable portability shall be read in light of the Consumer Rights Directive<sup>79</sup>. Article 24 (1) of the Directive states that “*Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive*”. This could be understood as the option of making National Consumer Agencies responsible for enforcement of the portability right.

Another route would be to align enforcement of the portability right with the solution adopted in Article 6(4) of the Information Society Directive, as regards guaranteeing certain exceptions against the application of technological protection measures. According to this provision, “*4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned, Member States shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.*”

This parallel is justified because in both cases (copyright exceptions whose exercise is being hampered by technological protection measures and the portability right whose enjoyment is being hampered by geo-blocking) lawful access to copyright and related rights-protected content is *de facto* restricted due to the application of technical means of restriction.

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<sup>79</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/64, 22.11.2011.

Therefore, useful lessons can be learned from the implementation of Article 6 (4) in Member States. As the Study on the implementation of Directive 2001/29/EC in the Member States shows, "*Procedural solutions for resolving disputes between right holders and certain beneficiaries have been implemented in some Member States that have transposed Article 6 (4).... These include direct access to the judiciary; access to specific administrative proceedings resulting in an administrative order that can be challenged before courts; arbitration procedures resulting in an award that can eventually be challenged before courts; mediation and similar dispute resolution mechanisms;*"<sup>80</sup>

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<sup>80</sup> Guido Westkamp, *The Implementation of Directive 2001/29/EC in the Member States*, February 2007, p. 67. Available at: [http://ec.europa.eu/internal\\_market/copyright/docs/studies/infosoc-study-annex\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf).

## 7. AUTHENTICATION

The Regulation safeguards the effective application of the portability right by invalidating any contractual provisions which prohibit portability as being unenforceable (Article 5) and by giving retroactive effect to the provisions of the Regulation (Article 7). At first sight, this would appear to be compatible with the principle of proportionality, since, by ensuring the application of portability on the grounds of existing contracts which are interpreted mandatorily in a way compatible with the proposed Regulation's provisions, the Regulation appears to mainly respect the content of existing licensing contracts and does not oblige right holders and service providers to renegotiate these contracts<sup>81</sup>. However, further scrutiny is necessary since the Regulation retroactively interferes with existing contracts. Therefore, it introduces a deviation from the hitherto established EU copyright law principle that EU legislative measures do not affect duly acquired rights, including rights acquired on the basis of a contract<sup>82</sup>.

The mechanism of declaring certain copyright exceptions as mandatory in the sense that they cannot be overridden by opposing contractual provisions has been used sporadically in other EU copyright law instruments (the Software Directive and the Database Directive), where specific copyright exceptions were upgraded to lawful users' rights. The same logic lies behind the portability exception, which is converted into a lawful subscriber's right. The portability right overrides any contractual provision, including those between holders of copyright and related rights, those holding any other rights relevant for the use of content in online content services and service providers, as well as between service providers and subscribers. Furthermore, the portability right is given a fully retroactive effect. According to Article 7, "*This Regulation shall apply also to contracts concluded and rights acquired before the date of its application if they are relevant for the provision, the access to and the use of an online content service in accordance with Article 3 after that date*".

While these provisions significantly reinforce the portability right and act in favour of the subscriber (lawful user), questions might be raised due to the fierce interference of these provisions with the private will of the contractual parties, as expressed in the contract. The Regulation aims to invalidate every contractual clause that grants a territorial exclusivity for service providers or a subscriber's right to use an online content service solely in the territory of a given Member State. These contractual restrictions correspond to the established practice of territorial licensing of copyright and related rights.

From a consumer point of view, the invalidation of these provisions is necessary for the effective enjoyment of portability. However, copyright and intellectual property rights, including contractual rights arising from the exploitation of intellectual property rights, are protected as "possessions" by the First additional protocol of the ECHR and by Article 17 of the EU Charter of Fundamental Rights. So, every interference must be prescribed by law,

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<sup>81</sup> See recitals 26 and 29 of the proposed Regulation. See also: Y. Gaubiac, F. Gotzen, Première évaluation de la méthode adoptée par la Commission dans ses propositions du 9 décembre 2015 sur la modernisation du droit d'auteur dans un marché unique numérique connecté, available on line at: <http://www.fondation-droitcontinental.org>.

<sup>82</sup> Expressions of that principle are Articles 14(2) and 14 (4) of the Database Directive. According to those provisions "2. *Notwithstanding paragraph 1, where a database protected under copyright arrangements in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3 (1), this Directive shall not result in any curtailing in that Member State of the remaining term of protection afforded under those arrangements.*" and "*The protection provided for in paragraphs 1 and 3 shall be without prejudice to any acts concluded and rights acquired before the date referred to in those paragraphs.*". See also Article 13(6) of the Rental and Lending Directive 93/98/EEC (now Article 11(5) of Directive 2006/115/EC- codified version of 12 December 2006). For the interpretation of those provisions see: S.von Lewinski, Commentary of Article 13 of the Rental and Lending Rights Directive and Commentary of Article 14 of the Database Directive, in: M. Walter, S. von Lewinski (ed.), *European Copyright Law, A Commentary*, OUP, 2010, p. 344 et seq., p. 788 et seq.

be in the public interest, and shall be necessary in a democratic society. In this balancing exercise, as Griffiths notes, *"in its assessment of proportionality, the European Court of Human Rights has typically accorded national decision-makers a broader margin of appreciation discretion under Art 1, Protocol 1 than has generally been permitted in the case of other qualified rights under the Convention"*<sup>83</sup>.

Indeed, the protection of copyright law as a component of property rights stands as a guideline and a constraint that the EU legislator shall take into consideration each time he or she intervenes in that field or makes a law that affects copyright law<sup>84</sup>. In this context, even though legislation which restricts existing rights would not necessarily be inconsistent with Art. 1 of the First Protocol to the ECHR or Art.17 of the Charter of Fundamental Rights of the EU, the legislative copyright harmonization measures taken thus far have been careful to preserve existing rights, even where the underlying basis of protection has been restricted in scope for the future<sup>85</sup>. The ECHR's standing in *Dima v Romania* could be a basis for a reserved and careful approach as regards a new law with retroactive application interfering with an existing possession. Indeed, the ECHR's authority that copyright protection exists from the moment an author creates a work could act in favour of authors and right holders who challenge a change in applicable law<sup>86</sup>. As Helfer notes, *"this concern extends not only to interactions between the state and right holders, but also to disputes between private parties"*<sup>87</sup>. It has to be explored whether the balance between copyright protection and the public interest will be considered a fair one, as regards the retroactive effect of the proposed Regulation on established property rights. Indeed, since the proposed Regulation interferes with existing possessions, the compatibility of such an interference with the protection of property will be affirmed only if the Regulation's provisions are found to strike a fair and proportional balance between copyright law and the public interest.

Copyright law and related rights are protected as "intellectual property", thus a special kind of "property" according to Article 17 of the Charter of Fundamental Rights. As has been highlighted by the CJEU in the *Scarlet* case, *"The protection of the right to intellectual property is indeed enshrined in Art. 17(2) of the Charter...There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected"*<sup>88</sup>.

So, while in principle it is possible to restrict existing copyright prerogatives, a thorough and detailed analysis of the fair balancing process in light of the ECHR's case law shall be made in order to ascertain whether specific interference is a justified and proportionate restriction. In this context, it has first to be explored whether the interference in copyright and related rights created by the portability right is a deprivation of "property" or another kind of interference, such as a control of use. The difference is crucial since a total deprivation of property should be normally compensated<sup>89</sup>, while *"the use of property may be regulated by law in so far as is necessary for the general interest"*. In this context, *"lesser interferences such as the dispossession of individual rights within the overall bundle*

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<sup>83</sup> J. Griffiths, *Constitutionalising or harmonising? – the Court of Justice, the right to property and European copyright law*, (2013) 38 *European Law Review*, p. 65-78.

<sup>84</sup> Georgopoulos, *op.cit.*, p. 40.

<sup>85</sup> E. Derclaye, T. Cook Trevor, *op.cit.*, p. 262.

<sup>86</sup> L. Helfer, *The New Innovation Frontier? Intellectual property and the European Court of Human Rights*, in: P. Torremans, *Intellectual Property and Human Rights*, Wolters Kluwer, Law & Business, 2008, p. 43.

<sup>87</sup> Helfer, *op.cit.*, p.71.

<sup>88</sup> *Scarlet Extended SA v SABAM* (Case C-70/10) [2012] E.C.D.R. 4, par. 43.

<sup>89</sup> Article 17 par. 1 of the Charter: *"...No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."* See also: Griffiths, McDonagh, *Fundamental Rights and European IP law: the case of Article 17 (2) of the EU Charter*, *op.cit.*, p. 81.

*have tended to be viewed as controls of use and therefore not to give rise to a presumed entitlement of compensation*<sup>90</sup>.

The Digital Single Market strategy seeks to allow better access for consumers and business to online goods and services across Europe. So, in the Commission's Digital Single Market strategy, the free movement of goods and services within the EU is seen as a pillar for enhancing consumer interests in the EU. Indeed, internal market freedoms have a twofold relationship with consumer protection. Consumer interests coupled with the principle of human dignity may help to justify an exception to the free movement of goods and services<sup>91</sup>. On the other hand, economic freedoms and free completion can also act as a pillar for strengthening consumer protection. Article 169 of the TFEU provides that "*In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests*".

Article 38 of the Charter recognizes consumer protection as a legal principle<sup>92</sup> of EU law. According to this provision "*Union policies shall ensure a high level of consumer protection*". As Benohr notes, the recognition of the Charter by the Lisbon Treaty may enhance consumer protection. In this context, contractual relations between private parties might be affected and "*A contract can be tested through a fundamental rights review of EU legislation or national laws adopted to implement directives. Such a contractual review may challenge the validity of certain contractual terms and strengthen the position of the consumer as the weaker contractual party*"<sup>93</sup>.

In light of the above, there is not a clear and straightforward principle that prohibits the proposed Regulation's provisions from interfering with established copyright and related rights, while on the other hand, it is also possible that consumer interests might prevail, even against the expressed contractual will of the parties in consumer contracts. Since the legal fiction of Article 4 does not interfere with the whole bundle of economic and moral prerogatives which constitute the core of the protection awarded by copyright law, but only with a specific economic prerogative (the right to communication to the public, including the making available right), it is very likely that the interference will be considered as a control of use of property and not as a deprivation of property. Therefore, *prima facie* the imposition of a compensation does not seem necessary. On the other hand, since the portability exception must be compatible with the three-step test, which has been interpreted hitherto on the basis of economy-oriented criteria, such an obligation cannot be absolutely excluded, especially if the scope of application of the privilege of portability is not strictly defined.

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<sup>90</sup> Griffiths, *Constitutionalising or harmonising? – the Court of Justice, the right to property and European copyright law*, op.cit.

<sup>91</sup> Iris Benohr, *EU Consumer Law and Human Rights*, Oxford Studies in European Law, 2013, p. 67. See: Case C-36/02.

<sup>92</sup> Iris Benohr, *EU Consumer Law and Human Rights*, op.cit.p. 64.

<sup>93</sup> Iris Benohr, op.cit., p. 67.

## DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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